

In re) Fair Hearing No. B-08/09-433
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Appeal of)

The parties do not dispute the facts underlying the licensing violation. The issue is whether the violation is a serious violation. The parties have briefed the issue.

1. The petitioners operate an Early Childhood Program (ECP).

2. N.T. is a licensing field specialist employed by CDD. D.H. is a CDD employee for specialized services.

3. On July 7, 2009, N.T. and D.H. conducted a site visit at petitioners' ECP.

4. N.T. and D.H. cited the petitioners with two violations and several observations. The violations were improper supervision and failure to request record checks. A

subsequent Commissioner's Review downgraded the failure to request record checks to an observation.

5. The violation in issue is based on improper supervision. The CDD has determined that the violation for improper supervision is a serious violation necessitating parental notification.

6. The factual basis for improper supervision in the Licensing Site Visit form states:

A Preschool child was in the cubby area for three minutes without any staff visually supervising her. The child let herself out of the kitchen door into the hallway without a staff member noticing that she had left the room, she was in the cubby area alone for three minutes and then let herself back into the classroom without being noticed by a staff member. The main entrance to the facility is in this cubby area and leads to a driveway and main road.

ORDER

The Department's decision is affirmed.

REASONS

The Legislature has given the CDD the authority to promulgate regulations governing the operation of Early Childhood Programs to ensure the quality of care for children and the protection of children. 33 V.S.A. § 306(b). In particular, the Legislature addressed the CDD's authority to

define "serious violations" in 33 V.S.A. § 306(b)(7) which states:

Whenever the department determines that a licensed child care facility or registered family child care home has violated a health or safety rule, the facility or home shall post the department's notice of violation in a conspicuous place in the facility or home. In the case of a serious violation, as defined by the department by rule, the facility or home shall also notify a person responsible for the welfare of each child attending that facility or home, by mail. A serious violation shall include violation of group size and staffing requirements and any violation involving a situation which immediately imperils the health, safety, or well-being of persons in the care of the licensee or registrant.

The CDD properly promulgated regulations to define "serious violations" pursuant to the Vermont Administrative Procedures Act. "Serious Violation" is defined as:

[a] violation of group size, staffing requirements or series of violations which immediately imperils the health, safety or well-being of children. Serious violations may also include corporal punishment, lack of supervision, physical or sexual abuse or health and safety requirements.

The petitioner questions the inclusion of lack of supervision as a serious violation in his case because the regulation uses the word "may" and because the CDD staff did not intervene when the child went into the cubby area.

No regulation can spell out every possible violation that rises to the level of a serious violation that imperils

children. The CDD included lack of supervision in the definition because lack of supervision may imperil children. The regulations allow CDD the discretion to determine which violations rise to the level of "serious violations".

The CDD is basing the above violation on Regulation I.D.1 which states:

Each child shall be visually supervised at all times in person by staff (except sleeping infants who are subject to in-person checks every 15 minutes—see V.D.3). Children must be visually supervised while napping/resting.

Regulation I.D.1 needs to be read in conjunction with the definition of "supervision of children" which states:

The knowledge of and accounting for the activity and whereabouts of each child in care and the proximity of staff to children at all times assuring immediate intervention of staff to safeguard a child from harm.

The key is not eyes on each child at all times. The key is the ability for staff to intervene because staff is aware of what the children are doing and where they are. See Fair Hearing No. B-04/09-233.

In this case, staff were not aware of a three year old child's whereabouts for three minutes, a period in which the child left a classroom and entered an area that included the main entrance and access to a driveway and road.

The CDD acted within its regulatory discretion in determining that the particular violation was a "serious

violation". The fact that CDD staff did not intervene does not mitigate the seriousness of the violation; they were capable of intervening because they were aware of the child's whereabouts. Petitioners' staff were not capable of intervening.

Based on the foregoing, the Department's decision is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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